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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOB MAXFIELD, INC., d/b/a
BOB MAXFIELD AMERICAN,
BOB MAXFIELD and SONDRA MAXFIELD,
Petitioners

v.

AMERICAN MOTORS CORPORATION,
MEMORIAL BANK OF HOUSTON, TEXAS,
AMERICAN MOTORS SALES CORPORATION,
and AMERICAN MOTORS REALTY
CORPORATION,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

American Motors Corporation, American Motors Sales Corporation, and American Motors Realty Corporation (hereinafter sometimes collectively referred to as "AMC") respectfully submit their brief in opposition to the petition of Bob Maxfield, Inc., d/b/a Bob Maxfield Ameri-

can, Bob Maxfield and Sondra Maxfield (hereinafter sometimes collectively referred to as "Maxfield") for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

AMC disputes that this Court has jurisdiction to hear the case at bar because of the following failures of Maxfield to comply with the Rules of this Court in connection with the filing of the petition for writ of certiorari.

The petition in this civil case was required to be filed within 90 days after the date of the denial of Maxfield's petition for rehearing. 28 U.S.C. § 2101(c); Sup.Ct.R. 20.2 and 20.4.

Maxfield's petition reflects that the Fifth Circuit denied petition for rehearing on March 23, 1981, Maxfield's petition, App. B. 2; therefore, Maxfield's petition was due to be filed on June 22, 1981, but it is believed that it was not filed until June 30, 1981, or later since the certificate of service of Maxfield's petition reflects that it was not mailed to opposing counsel until June 30, 1981. Maxfield's petition, p. 2.

It is the understanding of counsel for AMC based on a telephone conversation with the Office of the Clerk of this Court that Maxfield may have obtained an extension of time to file the petition. We, however, have searched our files and have not located a copy of any application by Maxfield for an extension of time to file the petition, and therefore believe that it did not send us a copy of the same, even though it was required to serve a copy upon us as counsel for AMC. Sup.Ct.R. 29.3.

Furthermore, we have searched our files and have not located a copy of any notification to us by Maxfield of the date of filing and of the docket number of this cause and therefore we believe that it did not send us a copy of the same, even though required to do so by Sup.Ct.R. 19.3.

Moreover, Maxfield has failed to set forth in the petition for writ of certiorari the date and terms of any order granting an extension of time within which to file the petition although required to do so by Sup.Ct.R. 21.1a (ii).

Finally, Maxfield's petition exceeds the 30-page maximum limit imposed by Sup.Ct.R. 21.4.

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

The writ should be denied because there is no showing of special and important reasons why it should be granted. There are no claims that the Fifth Circuit's decision is in conflict with the decision of another federal court of appeals or of a state court of last resort, or that it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Furthermore, there are no claims that the Fifth Circuit in this case decided an important question of federal law which has not been but should be settled by this Court or that it decided a federal question in a way which is in conflict with decisions of this Court.

The writ should also be denied because the Fifth Circuit correctly ruled on the legal issues in question.

It did not hold, as claimed by Maxfield, that proof of the coercion required for an illegal tie-in antitrust violation may not be made by circumstantial evidence, but it simply held that an illegal tie-in requires more than persuasion and requires coercion of a customer to buy a tied product in order to obtain a tying product, which is a correct statement of the law.

Even if the Fifth Circuit had been incorrect in its holding on antitrust coercion, there were other grounds that supported its decision on the antitrust claims, including that there was no showing by Maxfield: (1) that AMC had sufficient economic power in the tying product market to appreciably be able to restrain free compeition in the tied product market, (2) that there were anti-competitive effects in the tied product market as a result of the matters complained about, and (3) that there was injury to Maxfield as a result of any alleged illegal conduct.

The Fifth Circuit correctly decided the Automobile Dealer Act issues and did not hold, as claimed by Maxfield, that the bad faith required for a violation of that Act may not be proved circumstantially. Its holding was simply that actual coercion, intimidation or threats are essential elements of a cause of action under that Act which is well-established by all authorities.

ARGUMENT AND AUTHORITIES

I. NO SHOWING OF SPECIAL AND IMPORTANT REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

Maxfield's petition does not set forth, as required by Sup.Ct.R. 17, sufficient reasons why writ of certiorari

should be granted. There is no claim that the Fifth Circuit decision is in conflict with the decision of another federal court of appeals on the same matter, that it is in any way in conflict with a decision of a state court of last resort, or that it has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

There is also no claim that the Fifth Circuit in this case decided an important question of federal law which has not been but should be settled by this Court or has decided a federal question in a way which is in conflict with applicable decisions of this Court.

Maxfield simply contends that the Fifth Circuit erred in deciding two legal points or if it did not err, that the district court and the Fifth Circuit erred in holding that there was insufficient evidence to allow the case to be presented to a jury.

The legal points in question are not important enough to warrant review by this Court, and in addition the holdings on the same were correct and in accord with the holdings of other courts.

In effect, Maxfield simply wants this Court to review questions of evidence and factual findings and to render a decision that would only affect the litigants here and no one else.

II. MAXFIELD'S ANTITRUST CLAIMS

A. FIFTH CIRCUIT CORRECTLY DECIDED COERCION ISSUE

Maxfield contends that the Fifth Circuit erred in its ruling on the coercion required for there to be an illegal

tie-in because the Court's coercion test precludes proof of coercion by circumstantial evidence. Maxfield's own petition, however, refutes this claim because it states: "Although the opinion of the Fifth Circuit recognizes that 'coercion' may be implied from a course of dealing . . ." Maxfield's petition, p. 27.

What the Fifth Circuit actually held was that "An anti-trust violation occurs only if it [a defendant] goes beyond persuasion and coerces or forces its customers to buy the tied product in order to obtain the tying product." Maxfield petition, A. 8. Such is a correct pronouncement of the law and is in accord with a long line of authorities. *Ogden Food Service Corp. v. Mitchell,* 614 F.2d 1001, 1002 (5th Cir. 1980); *Response of Caroline, Inc. v. Leasco Response, Inc.,* 537 F.2d 1307, 1327-28 (5th Cir. 1976); *Ungar v. Dunkin Donuts,* 531 F.2d 1211, 1224-25 (3rd Cir. 1976), cert. denied 429 U.S. 823 (1976); *Halverson v. Convenience Food Mart, Inc.,* 69 F.R.D. 331, 335-36 (N.D. Ill. 1974); and *Lah v. Shell Oil Co.,* 50 F.R.D. 198 (S.D. Ohio 1970).

B. OTHER GROUNDS SUPPORT DECISION REACHED BY FIFTH CIRCUIT ON ANTITRUST CLAIMS

1. Lack of Showing of Economic Power in Tying Product Market

In addition to the grounds set forth in the Fifth Circuit opinion in support of its holding that the District Court properly granted directed verdict on Maxfield's antitrust claims of illegal tie-in and full line forcing, other grounds not mentioned by the Court also support that holding. One such ground is the failure of Maxfield to

show, as required by *U.S. Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977), that AMC had sufficient economic power in the tying product market to appreciably be able to restrain free competition in the tied product market.

Maxfield not only failed to present substantial evidence to create a jury issue on the question of sufficient economic power in the tying product market, but its evidence proved to the contrary.

Maxfield contends that Gremlins and smaller cars were the tying product and that Matadors and Ambassadors were the tied product. Bob Maxfield, one of the owners of Maxfield, testified that there is not much customer loyalty for AMC cars. Tr. I-109. Maxfield's expert report, Pl. Ex. 553; p. 17, 21, reflects that in 1972 only 12% of the compact cars registered in Harris County where Maxfield was located were AMC compacts, and that in 1973, only approximately 10% were AMC compacts. Maxfield was only in business in 1972 and 1973. A 10% to 12% of the market not only does not demonstrate sufficient economic power in the small car market to be able to force the purchase of large undesired cars, but to the contrary, it demonstrates that in Harris County approximately 90% of the purchasers of small cars preferred the small cars of competitors to those of AMC.

In the *Fortner Enterprises, Inc.*, case, the question was whether U. S. Steel had sufficient economic power in the market for the tying product, credit, to force the purchase by plaintiff of more expensive prefabricated houses from U.S. Steel than its competitors offered. The credit was 100% financing at a particularly low rate and only available on the sale of the prefabricated houses. The Court

held that the size of U. S. Steel, the large number of tying arrangements that U. S. Steel entered into, and the non-competitive price paid by Fortner for the tied product did not show economic power in the tying product. This Court also held that the fact that the tying product was unique or "without like or equal" did not mean that the seller possessed economic power for it may have been willing to accept a lesser profit or to incur greater risks than its competitors, which kind of uniqueness will not give rise to an inference of economic power.

This Court further held that without evidence that the tying product credit had some cost advantage over its competitors or that the defendant could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected, the unique character of its financing would not support the conclusion that the defendant had the kind of economic power which the plaintiff had the burden of proving.

The Fifth Circuit in *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), held that the *Fortner Enterprises, Inc.*, case requires that the plaintiff prove that the defendant had some economic advantage which enabled it to offer the arrangement making the tying product advantageous where its competitors could not, that the economic power must come from a defendant's relationship with its competition, and if it had effective competitors in the tying product, economic power would not be shown.

There was no evidence that AMC did not have effective competition to its smaller cars or that AMC had some advantage not shared by its competitors in the market for these cars, but to the contrary, the evidence

reflected not only that AMC had effective competition but that in 1972-1973 its competitors had approximately 88-90% of that market in Harris County, while AMC had only 10-12%. Therefore, there was no showing that AMC had the sufficient economic power in the tying product market required for there to be an illegal tie-in.

2. No Effect on Competition in the Tied Product Market

The Fifth Circuit also properly affirmed the directed verdict on Maxfield's illegal tie-in and full-line forcing claims because there was no showing of anticompetitive effects in the tied product market, i.e., cars of competitors of AMC which compete with the undesired cars.

There was no evidence that Maxfield would have purchased cars competing with the alleged tied cars except for the tie-in or even that it could have obtained a franchise which would have enabled it to do so. To the contrary, Bob Maxfield testified that he had sought unsuccessfully to obtain Ford, Lincoln-Mercury, Buick-Pontiac and Dodge dealerships, Tr. I-51, before obtaining an AMC franchise. There also was not sufficient evidence even as to how many undesired cars Maxfield claims it was *coerced* to purchase to obtain desired cars, and therefore no way to know the maximum number of tied cars Maxfield might have purchased from competitors of AMC.

Unless Maxfield would have purchased cars from competitors of AMC except for being coerced by a tie-in to buy AMC cars there could be no anti-competitive effects in the tied market. No illegal tie-in results from being coerced to purchase cars one otherwise would not

have purchased at all, because such does not harm competition in the tied product market.

It is clear that the evil inherent in an illegal tie-in is damage to competition in the tied product market. *Southern Concrete Co. v. United Steel Corp.*, 535 F.2d 313 (5th Cir. 1976); *Response of Caroline, Inc. v. Leaseco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976). The same elements are required for an illegal tie-in under Sec. 3 of the Clayton Act as under Sec. 1 of the Sherman Act, and under both acts a not insubstantial amount of commerce in the tied product market must be restrained as a result of the tie-in. *Heatransfer Corp. v. Volkswagenwerk*, 553 F.2d 964 (5th Cir. 1977).

David R. McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974), involved claims, similar to those here, that the defendants attempted to coerce the plaintiff to take an undesired car line in order to receive desired cars which the plaintiff refused to do, and that as a result of the refusal the plaintiff's supply of the desired cars was cut back. The Court held that there was no illegal tie-in because there was no showing that the conduct complained of impeded competition between the undesired car lines and other cars in the style and price range.

3. No Showing of Antitrust Injury

The Fifth Circuit also properly affirmed the District Court on the tie-in and full line forcing claims because there was no substantial evidence to create a jury issue on whether the same caused injury or damage to Maxfield's business. *Comfort Trane Air Conditioning v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979).

The injury resulting from an illegal tie-in or full line forcing in this case would have to be injury resulting from the purchasing of cars, Matadors and Ambassadors, that Maxfield did not want but was *coerced*, rather than *persuaded*, to purchase in order to get cars that it did want.

Bob Maxfield testified that there was no correlation between how many Gremlins and Hornets Maxfield would receive for how many Ambassadors and Matadors. Tr. III-173. Maxfield's records reflect that it received 722 cars of which 322 were Gremlins, 165 were Hornets and only 34 were Matadors and 32 were Ambassadors. Pl. Ex. 40.

Bob Maxfield stated there was no objection or opposition made to any orders for 1972 cars or to the initial order for 1973 cars, and that the advice of AMC was followed in ordering these cars. Tr. I-99-100; III-181-183. The initial order for 1973 cars was placed in June of 1972 for cars to be received in September or October 1972. Tr. I-98-100.

While Bob Maxfield stated that in October or November he began to resist Ambassadors and Matadors, he also stated that he agreed in October or November of 1972 to order Ambassadors or Matadors upon a representation that the AMC district manager would move the cars if they could not be sold. Tr. I-120-121, and not because he was coerced to purchase them to obtain desired cars. On October 9, 1972, Maxfield ordered 2 Matadors and 4 Ambassadors, Pl. Ex. 39, which had to be the October or November order that Maxfield referred to, since there is no evidence of any other orders by Plaintiff at that time.

Therefore, Bob Maxfield's own testimony proved there was no tie-in coercion as to 1972 cars and the initial 1973 models which arrived in September or October since he made no objection to and followed the advice of AMC as to these orders, nor as to the cars ordered on October 9, 1972, because they were purchased simply on a promise that the district manager would move them if they did not sell. Maxfield's records reflect that from November through December it received only 3 Ambassadors and 3 Matadors, Pl. Ex. 40, and all but one Matador had to be those ordered on October 9, 1972. Therefore, there was no coercion in connection with cars ordered before and received through December 1972, with the possible exception of 1 Matador, about which there is no specific testimony concerning coercion.

In ordering for January 1973 delivery, which occurred in December, Bob Maxfield stated that he refused to purchase an Ambassador requested by AMC and did not receive it. Tr. III-175-176. The December 1972 order form for January cars has on it a notation of "refused" as to one Ambassador, and also has an order for one Matador which was not refused, and an order for 13 Gremlins and 9 Hornets, Pl. Ex. 39. Maxfield must not have been coerced as to the Matador and it received 13 Gremlins and 17 Hornets in January 1973. Pl. Ex. 40. Therefore, there was no tie-in coercion as to cars ordered through December and received in January.

Bob Maxfield stated that in December 1972 he wrote AMC and cancelled Ambassadors ordered without his authorization and that his reason for doing so was to prevent AMC from processing any more Ambassador orders without his consent. Tr. II-118.

Therefore, the evidence established two specific instances when Maxfield objected to cars, refused to take them and never received them. There is no evidence of any specific instance when it objected and refused to take cars but was coerced into taking them.

After Maxfield's refusal of Ambassadors in December, Bob Maxfield stated that Maxfield did order and receive Ambassadors because they were special orders for customers. Tr. II-4. Obviously, it was not coerced as to those ordered after December.

From December 1972 when Maxfield refused Ambassadors to May 31, 1973, the last month of Maxfield's existence, it received only 5 Matadors and 5 Ambassadors, but also received 73 Gremlins and 38 Hornets, Pl. Ex. 40, was invoiced for approximately 51 more in May, Def. Ex. 13-64, and was promised an additional 100 cars to be built in June and July. Pl. Ex. 43.

There was simply insufficient evidence for a fact issue on antitrust damages, not only because the record does not establish how many, if any, cars Maxfield claimed it was coerced by a tie-in to take which it would have purchased from competitors of AMC, but also because it does not establish whether Maxfield sold those it claims it was coerced to take and the amount, if any, of the loss it suffered from being coerced by a tie-in to purchase those cars.

Maxfield's petition at page 33 claims that it was required to take 18 Matadors and 18 Ambassadors that it did not want in order to obtain Gremlins. The record simply does not sustain that position, not only for all

the reasons previously stated, but also because at the place in the transcript to which Maxfield has reference, Tr. III-183, there is no testimony that it was coerced to take 18 Ambassadors and 18 Matadors in order to receive desired cars. The record at this point is printed in the footnote below.[1]

Maxfield's expert does not provide any evidence of damage from tie-in coercion because the expert testified that he did not know what caused a loss to Maxfield and simply assumed Maxfield would have been in business for ten years basically because Maxfield's attorney told him to so assume, and then determined how much money, in his opinion, Maxfield would have made had he been in business for ten years. Tr. IX-181; X-99-103, 116.

III. FIFTH CIRCUIT CORRECTLY DECIDED AUTOMOBILE DEALER ACT ISSUES

Maxfield also contends that the Fifth Circuit erred in its ruling on the elements of a cause of action under the Automobile Dealer Act. 15 U.S.C. § 1222. Maxfield claims that the Court held that the requisite "bad faith" required for a violation of that Act may not be proved circumstantially.

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1. Q. As to all the '72 models, you didn't voice any opposition to the taking of those cars?
   A. No, sir.
   Q. How many '73 cars are we talking about? How many '73 Matadors and '73 Ambassadors?
   A. We are talking about 19 Ambassadors—let's see, 18 Ambassadors and 18 Matadors.
   Q. Those 18 cars of each that you contend you were required to take in order to get Gremlins—
   (Thereafter an objection was made and no answer was ever given by Maxfield.)

The Fifth Circuit did not so hold. What it did hold was: "Accordingly, it is well established that actual coercion, intimidations, or threats are an essential element of a cause of action under the Act." Maxfield petition, A. 11.

The Fifth Circuit was correct in so holding, for such a holding is well established. *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932, 935 (5th Cir. 1967), cert. denied, 389 U.S. 832 (1967); *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir. 1962), cert. denied, 369 U.S. 887 (1962); see H.R. Rep. No. 2850, 84th Cong., 2d Sess. 9, reprinted in [1956] U.S. Code Cong. & Ad. News, pp. 4596, 4603.[2]

Since coercion is clearly required for a violation of the Automobile Dealer Act, the discussion in this brief concerning no coercion, intimidation or threats against Maxfield to force it to take unwanted cars demonstrates there was no violation of that Act.

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2. Accord, e.g., *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 445 (9th Cir. 1979); *Minson Plymouth, Inc. v. Chrysler Motors Corp.*, 554 F.2d 1266 (per curiam) (4th Cir. 1977); *Fray Chevrolet Sales, Inc. v. General Motors Corp.*, 536 F.2d 683, 685 (6th Cir. 1976); *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp.*, 461 F.2d 608, 610 (7th Cir. 1972), cert. denied, 409 U.S. 981 (1972); *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 561 (2d Cir. 1970); *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 712 (10th Cir. 1970); *Kotula v. Ford Motor Co.*, 338 F.2d 732, 734, cert. denied, 380 U.S. 979 (1965); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645, 646 (3rd Cir. 1964).

CONCLUSION

AMC for the reasons set forth in this brief respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, the undersigned hereby certifies that three (3) copies of the foregoing brief in opposition have been served upon Jack N. Price, 410 Congress Avenue, Second Floor, Austin, Texas, counsel for Petitioner, by depositing the same in the United States Mail with first class postage affixed, on the 6th day of August, 1981.

JAMES C. SLAUGHTER